

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Sandwich Isles Communications, Inc.)	WC Docket No. 09-133
Petition for Declaratory Ruling)	

To: Chief, Wireline Competition Bureau

**Emergency Motion Requesting Access to NECA Rules, Regulations,
Guidance and Precedent of Any Type Relied Upon by NECA, Carriers
Or Regulatory Personnel in Connection with the Access Charge Regime**

Sandwich Isles Communications, Inc. ("SIC"), pursuant to the Protective Order issued herein on August 26, 2009, and Section 1.1 of the Commission's rules, hereby moves for an Order from the Bureau directing the National Exchange Carrier Association ("NECA") to provide counsel to SIC with access to any and all rules, regulations, guidance and precedent of any type, whether formal or informal ("NECA Rules") related to the access charge regime and relied upon by: (a) NECA in the performance of its duties, (b) carriers in compliance with FCC rules and regulations and NECA Rules, and/or (c) FCC or state regulatory or quasi-regulatory personnel in the performance of their official duties. SIC counsel does not request access to any accounting data or confidential information of any carrier. In support hereof SIC respectfully shows as follows.

I. Request for Access

SIC asked NECA for access to the NECA Rules upon filing its Petition for

Reconsideration ("Recon Petition"), and was told that it would not be possible.¹ SIC had hoped that NECA would reconsider, given the obvious importance of the request. However, on December 6, 2010, NECA filed Comments in opposition to SIC's Recon Petition² in which NECA asserts that the Spare Fiber Guidelines³ are irrelevant, that access to the NECA Rules by SIC and its accounting consultant is sufficient, and that SIC's counsel is not entitled to access the NECA Rules.⁴

Due Process. NECA's position -- that SIC's counsel should rely upon legal research conducted by SIC's accountants -- denies SIC due process under settled Commission case law.⁵ The Commission has held that confidentiality concerns should be addressed by an appropriate protective order and do not justify denial of access to relevant information.⁶ In this case there is already a Protective Order in place allowing confidential information to be provided to SIC's counsel under reliable protections.⁷ The Bureau should therefore order NECA to provide SIC

¹ See attached Letter from James A. Stenger, Counsel to SIC, to Gregory Vogt, Counsel to NECA (Nov. 8, 2010).

² Sandwich Isles Communications, Inc. Petition for Reconsideration, WC Docket No. 09-133 (Oct. 29, 2010) ("Recon Petition").

³ NECA, Spare Fiber C&W Investment Cost Reporting Guidelines (Mar. 5, 2004) ("Spare Fiber Guidelines").

⁴ Comments of the National Exchange Carrier Association, Inc., WC Docket No. 09-133 (Dec. 6, 2010) ("NECA Comments").

⁵ See, e.g., *In re Applications of Mobile Communications Holdings, Inc.*, 18 FCC Rcd 133, at para. 3 (Jan. 9, 2003) ("[F]or the Commission to resolve the anti-trafficking issue based on information to which the Petitioners were denied access could constitute a denial of due process.") ("Mobile Communications").

⁶ *Mobile Communications* at para. 6 ("We therefore order the Applicants to disclose the documents in question to the Petitioners under the terms of attached protective order...."); see also *In the Matter of Application of WorldCom, Inc.*, Order (DA 98-1072), CC Docket No. 97-211 (June 5, 1998) ("Worldcom").

⁷ In the Matter of Sandwich Isles Communications, Inc., Protective Order (DA 09-188), WC Docket No. 09-188 (Aug. 26, 2009) ("Protective Order").

counsel immediate access to the NECA Rules based on the Protective Order.

Expedited Action. Expedited action on this request is justified and is essential to prevent unwarranted delay and consequent financial harm to SIC. Accordingly, SIC requests expedited action on this motion and issuance of an order directing NECA to give SIC counsel access to the NECA Rules.

II. Grounds for the Motion for Access to the NECA Rules

It is clear that the NECA Rules are relevant to a decision in this case. NECA has shown no basis to restrict access to SIC and its accounting consultant as any confidentiality concerns have already been addressed by the Protective Order in this case. Also, NECA's attempt to characterize the NECA Rules as "facts" or "evidence"⁸ is inaccurate and immaterial.⁹

A. The NECA Rules Are Relevant Legal Precedent to Which Counsel Must Have Access

The NECA Rules are relevant legal precedent that SIC counsel needs to access in order to represent SIC in this matter. NECA takes the position that the Spare Fiber Guidelines, and presumably also *any other NECA Rules not disclosed to date by NECA*, are irrelevant.¹⁰ NECA's position that NECA can unilaterally decide what legal precedent is relevant and conceal

⁸ NECA Comments at 2.

⁹ Section 1.1 of the FCC Rules allows the Bureau to order discovery of facts and evidence in "any matter" in which the information would be "necessary" or "helpful," including a declaratory ruling proceeding. *See, e.g., Nova Cellular West*, Order (DA 00-1835), File No. ENF-00-002 (Aug. 11, 2000) ("Although it is not clear from AirTouch's pleading exactly what its complaints are with respect to the existing procedures, it appears to object to the staff's decision to permit discovery in a proceeding initiated by a petition for declaratory ruling. It argues that we should dismiss Nova's petition and require it to start all over again by filing a formal complaint. The Commission, however, has broad discretion to 'conduct its proceedings in such manner as will best conduce to the proper dispatch of business and ends of justice.'")("Nova Cellular"); *see also FCC v. Schrieber*, 85 S. Ct. 1459 (1965) (upholding the Commission's broad authority to conduct investigatory proceedings and determine the scope of confidential treatment).

¹⁰ NECA Comments at 2-3.

all else must be rejected as inconsistent with due process.¹¹

NECA is charged with the responsibility of administering the access charge system.¹² NECA has asserted throughout this case that NECA is required to implement the Commission's rules.¹³ In order to implement the Commission's rules, NECA interprets the Commission's rules and then implements its interpretations.¹⁴ At least some NECA interpretations of Commission rules are issued in the form of NECA Cost Guidelines Papers.¹⁵ Counsel to SIC is unaware of what other relevant precedent may exist other than the Spare Fiber Guidelines. However titled, NECA's interpretations of FCC rules are intended to provide administrative guidelines that NECA members must follow in their cost submissions.

NECA freely characterizes its obligation to establish administrative guidelines as "essential." Specifically, NECA enters into a contract with all of its carriers. In that standard form contract, which NECA has entered into with SIC, NECA represents that:

[T]he establishment of uniform pooling methodology and administrative guidelines is essential to the FCC-ordered distribution of revenues among

¹¹ Furthermore, SIC counsel is entitled to present to the Bureau the absence of a NECA Rule. For example, SIC counsel finds it significant that NECA failed to produce a NECA Rule that embodies a "used and useful" standard, as this indicates that NECA does not apply such rule to other carriers. Only by having access to the NECA Rules can SIC counsel determine not only what rules exist, but also what rules do not exist.

¹² See 47 C.F.R. §§ 69.601-603.

¹³ See Comments of the National Exchange Carrier Association, WC Docket No. 09-133 at 4-8 (Aug. 31, 2009) (describing NECA's duties pursuant to FCC rules and regulations) ("NECA 2009 Comments").

¹⁴ *In the Matters of Safeguards to Improve the Administration of the Interstate Access Tariff and Revenue Distribution Process*, 10 FCC Rcd 6243, at para. 45 (Mar. 8, 1995) ("Safeguards Order").

¹⁵ E.g., the Spare Fiber Guidelines, which are labeled by NECA as a "NECA Cost Guideline Paper".

exchange carriers and to assure the accurate and timely flow of funds among exchange carriers.¹⁶

Given that it is "essential" for NECA to establish administrative guidelines, these guidelines are necessarily relevant legal precedent that SIC counsel must have access to in connection with this dispute regarding the SIC cost submission. SIC has suffered inaccurate and untimely payment due in no small part to NECA's failure to disclose the Spare Fiber Guidelines.

The Bureau has given effect to rules adopted by NECA, such as the two year true-up rule.¹⁷ Similarly, in the TRS context, the Commission has recognized that NECA promulgates cost recovery guidelines.¹⁸ Likewise, USAC, a subsidiary of NECA, issues guidance with regard to payments into and out of the USF system. Thus, generally, and with regard to the instant proceeding, the NECA Rules constitute relevant legal precedent. It necessarily follows that counsel for SIC is entitled to access to this legal precedent.

Despite the fact that the NECA Rules are relevant legal precedent, NECA takes the position that it is sufficient for NECA to grant access to SIC company personnel and SIC

¹⁶ Agreement for the Distribution of Interstate Access Revenues of Sandwich Isles Communications, Inc., between SIC and NECA, at 2 (Apr. 10, 1998).

¹⁷ *In the Matter of Sandwich Isles Communications, Inc. Petition for Declaratory Ruling*, Declaratory Ruling, WC Docket No. 09-133, at para. 9 (Sept. 29, 2010) ; *see also In the Matter of July 1, 2004 Annual Access Charge Tariff Filings*, 19 FCC Rcd 18593, 18596-7, at para. 8 (Sept. 20, 2004) ("NECA asserts that its pooling procedures 'permit companies to report 'trued-up' actual interstate costs to the Common Line (CL) and Traffic Sensitive (TS) Pools for a period of up to twenty-four months after the data month.' NECA also gives its member companies a 24-month period for submitting revised data related to special access.")

¹⁸ *E.g., In the Matter of Telecommunications Relay Services*, 19 FCC Rcd 12475, at paras. 32-33 (June 30, 2004) (discussing NECA TRS cost recovery guidelines); *In the Matter of Telecommunications Relay Services*, 21 FCC Rcd 8050, at para. 10 (Jul. 12, 2006) ("Each year the TRS Fund administrator, NECA, gives the providers instructions for the cost data request forms, which outline various cost categories and give examples of the types of costs that can be included. NECA provides these guidelines so that providers consistently report only costs incurred in providing compensable services.")

accountants, and those personnel -- and not SIC's counsel -- can undertake the necessary legal research.¹⁹ NECA also faults SIC and its accounting consultant for not discovering and providing SIC's counsel with the Spare Fiber Guidelines at an earlier stage of this proceeding.²⁰ However, confidentiality concerns provide no basis to deny counsel direct access to relevant information because any concerns that NECA has regarding confidentiality are already addressed by the Protective Order.

B. SIC is Entitled to Access to the NECA Rules Under the Protective Order and Rule Section 1.1

It is well established that the Commission can order access to information pursuant to a protective order.²¹ As noted above, there is a Protective Order covering the exchange of confidential information in this proceeding. NECA and SIC jointly petitioned the Bureau to implement a protective order in this proceeding, anticipating that "information filed with comments pertaining to either Sandwich Isles or another commenter in this proceeding [was] likely to contain confidential information."²² Accordingly, the Bureau issued the Protective Order on August 26, 2009. The purpose of the Protective Order was to facilitate the exchange of confidential and proprietary information.

Contrary to the Protective Order, NECA has declined to give SIC counsel access to the NECA Rules on the grounds that the rules are "Proprietary."²³ After SIC discovered the Spare

¹⁹ NECA Comments at 2.

²⁰ See Letter from Gregory Vogt, counsel to NECA, to Marlene Dortch, Secretary, FCC, WC Docket No. 09-133 (Nov. 3, 2010).

²¹ See *Mobile Communications; Worldcom*, at n. 6, *supra*.

²² Sandwich Isles Communications, Inc., Petition for Declaratory Ruling, Joint Motion for Protective Order, WC Docket No. 09-133 (Aug. 10, 2009).

²³ For example, see the Spare Fiber Guidelines which are labeled as "NECA Proprietary".

Fiber Guidelines and filed them with the Commission in a redacted format, NECA immediately waived confidentiality and authorized their public release. Thus, NECA treats its rules as confidential until they are discovered and then admits that there is no harm to their public disclosure. Ironically, while NECA seeks to bar SIC counsel's access to its basic rules, NECA has obtained access to all requested SIC information and a great deal of SIC's confidential and propriety information has been disclosed in this proceeding.²⁴ NECA's denial of access to the NECA Rules is inconsistent with the Protective Order and should be dealt with on that basis alone.

It also is well-established that the Commission can order discovery in a declaratory ruling proceeding as well as in any other proceeding.²⁵ NECA characterizes the NECA Rules as "fact" and "evidence" with the implication being that SIC is seeking discovery. Guidelines and instructions that carriers are required to follow in preparing cost submissions are law while the cost data are the facts.²⁶ Labeling the NECA Rules "proprietary" does not change this. Nevertheless, it is clear that even if the Bureau accepts NECA's characterization of the NECA Rule as "facts" and "evidence," the rules provide for discovery "in any matter" where it is either "necessary" or merely "helpful."²⁷ Furthermore, the Commission determined that NECA did not

²⁴ See generally NECA 2009 Comments.

²⁵ See *Nova Cellular; FCC v. Schrieber*, at n. 9, *supra*.

²⁶ SIC counsel does not seek access to any cost data on the NECA website, only the NECA Rules.

²⁷ Section 1.1 of the Commission's rules provides:

"The Commission may on its own motion or petition of any interested party hold such proceedings as it may deem necessary from time to time in connection with the investigation of any matter which it has power to investigate under the law, or for the purpose of obtaining information necessary or helpful in the determination of its policies, the carrying out of its duties or the formulation or amendment of its rules and regulations. For such purposes it may subpoena witnesses and require the production of evidence. Procedures to be followed by the Commission shall, unless specifically

(Cont'd on following page)

need to provide the Commission with on-line access to its database based upon NECA's representation that information would be available upon request.²⁸ Thus, the Bureau is authorized to order discovery in any case if it sees fit. Nothing in Section 1.2 on declaratory proceedings contradicts or limits Section 1.1. In sum, under both the Protective Order and the rules, SIC is entitled to access to the NECA Rules.

C. Denial of Access Has Prejudiced SIC and Continues to Harm SIC

In this case, there is ready proof that the inability of SIC's counsel to review the NECA Rules has compromised the effectiveness of counsel. Had counsel had access to the Spare Fiber Guidelines, the Guidelines would have been the foundation for SIC's Petition for Declaratory Ruling because the Guidelines tell NECA how to account for spare fiber and the only issue in this case is whether SIC should be fully compensated for a fiber deployment where some of the fibers in the deployment are spare. Access to the Commission's rules is therefore not sufficient. NECA has its own rules, regulations, guidance and internal precedent and SIC counsel must have access to the NECA Rules in order to adequately represent SIC. This should not be a controversial issue. The Spare Fiber Guidelines are highly relevant to, if not utterly dispositive of, this dispute. NECA's failure to disclose the Spare Fiber Guidelines earlier caused a substantial and unwarranted delay and a waste of SIC and Bureau resources in this case. SIC counsel is entitled to access the NECA website in order to ensure that NECA has not failed to disclose other relevant NECA Rules.

(Cont'd from preceding page)

prescribed in this part, be such as in the opinion of the Commission will best serve the purposes of such proceedings." (emphasis added)

²⁸ *Safeguards Order* at para. 45.

It is simply incredible that after characterizing its guidelines as "essential," NECA then chose not to disclose the Spare Fiber Guidelines to the Bureau and SIC counsel, and NECA now declines to allow SIC counsel to perform basic legal research on the NECA Rules to see what other guidance or precedent may exist. Equally incredible is that NECA has never produced any guideline that embodies the "used and useful" standard that NECA alleges that SIC has violated. NECA's own characterization of its guidelines as essential makes it essential that counsel have access in order to determine whether a "used and useful" guideline exists and whether there are other relevant guidelines in addition to the Spare Fiber Guidelines.

III. Conclusion

WHEREFORE, for the foregoing reasons, the Bureau should order NECA immediately to provide SIC counsel with access to the NECA website for purposes of conducting legal research subject to the Protective Order.

Respectfully submitted,

By: 

Dana Frix
James A. Stenger
Megan E.L. Strand
Chadbourn & Parke LLP
1200 New Hampshire Avenue, NW
Washington, DC 20036
Telephone: (202) 974-5600

Counsel for Sandwich Isles Communications Inc.

Walter L. Raheb
Roberts Raheb & Gradler, LLC
1200 New Hampshire Avenue, NW
Washington, DC 20036

December 16, 2010

ATTACHMENT 1

Stenger Letter

CHADBOURNE
& PARKE LLP

James A. Stenger
direct tel (202) 974-5682 direct fax (202) 974-6782
jstenger@chadbourne.com

1200 New Hampshire Avenue NW, Washington, DC 20036
tel (202) 974-5600 fax (202) 974-5602

November 8, 2010

VIA E-MAIL & FIRST CLASS MAIL

Gregory J. Vogt
Law Offices of Gregory J. Vogt, PLLC
2121 Eisenhower Avenue
Suite 200
Alexandria, VA 22314

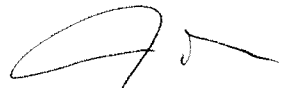
Re: Sandwich Isles Communications, Inc.
Petition for Declaratory Ruling, WC Docket No. 09-133

Dear Greg:

I wanted to write to thank you for so quickly obtaining NECA's consent to allow Sandwich Isle's reconsideration petition to be made public so that it could be put on public notice last Friday.

I also wanted to confirm our conversation from last Thursday morning. I called to see if it would be possible to obtain, for our firm, an ID and password that would permit me (and others in my firm) to be able to research NECA's "guidelines." (Since I have never had access to the database available to carriers, by "guidelines" I informally refer to whatever accounting or other instructions or policies NECA provides to carriers for the purpose of complying with NECA and FCC rules.) I understand that NECA decided not to provide us with access to NECA's confidential materials, but do note that your suggestion that we rely upon personnel of Sandwich Isles to advise us on these materials is, practically speaking, unworkable.

Very truly yours,



James A. Stenger



CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2010, I caused a copy of of the foregoing *Emergency Motion Requesting Access to NECA Rules, Regulations, Guidance and Precedent of Any Type Relied Upon by NECA, Carriers Or Regulatory Personnel in Connection with the Access Charge Regime* to be served to the following parties of record as indicated:

Via ECFS

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Via First Class Mail

Christopher M. Miller
Verizon
1320 North Courthouse Road, 9th Floor
Arlington, VA 22201
Counsel for Verizon

Via Electronic Mail

Pamela Arluk
Assistant Division Chief
Pricing Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 5-A131
Washington, DC 20554
pamela.arluk@fcc.gov

Via First Class Mail

Joe A. Douglas
NECA
1634 I Street, NW, Suite 510
Washington, DC 20006

Via Electronic Mail

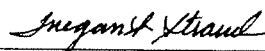
Best Copy and Printing, Inc.
Portals II
445 12th Street, S.W., Suite CY-B402
Washington, DC 20554

Via Electronic Mail

Robert B. McKenna
Suite 950
607 14th Street, NW
Washington, DC 20005
robert.mckenna@qwest.com
Counsel to Qwest Communications

Via Electronic Mail

Gregory J. Vogt
Law Offices of Gregory J. Vogt, LLC
2121 Eisenhower Avenue, Suite 200
Alexandria, VA 22314
gvogt@vogtlawfirm.com
Counsel to NECA



Megan E.L. Strand

Via Electronic Mail

David L. Lawson
Sidley Austin LLP
1501 K Street, N.W.
Washington, DC 20005
dlawson@sidley.com
Counsel to AT&T